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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

UNITED STATES OF AMERICA,	)	NO. 16-00246 HSG
	)	
Plaintiff,	)	<b>AMENDED UNITED STATES' SENTENCING</b>
	)	<b>MEMORANDUM</b>
v.	)	
	)	Time: 2:00 PM
ARNOLD FISCHMAN,	)	Date: February 13, 2017
	)	
Defendant.	)	Hon. Haywood S. Gilliam
	)	
	)	
	)	

**I. INTRODUCTION**

On September 19, 2016, defendant pled guilty to Possession of Child Pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). The government anticipates that the parties will argue for substantially different sentences to account for defendant's crime.

The parties agree that a guideline sentence for an Offense Level 30 crime for a defendant with no prior criminal history is a sentence ranging from 97 to 121 months. The United States Probation Office recommends a sentence of 60 months. For the reasons set forth below, the United States recommends a sentence of 78 months, which amounts to a substantial variance from the eight to ten-year sentence defendant faces. Defendant's crime also warrants a fine of \$15,000, an expanded search condition and

1 limitation on future internet use, as described in the Sentencing Recommendation from the Probation  
 2 Office, forfeiture, and a mandatory special assessment of \$100. The government also recommends that  
 3 defendant be ordered to pay \$5,000 in restitution to the only victim seeking restitution in this matter.

## 4 **II. BACKGROUND**

### 5 **A. Offense Conduct**

6 The factual statement of the plea agreement and the Probation Officer's Presentence Report  
 7 ("PSR") accurately set forth the facts, and the government will not repeat them at length here. The PSR  
 8 sets forth the factual basis for the application of the base offense level of conduct and each of the  
 9 sentencing enhancements applicable in this case.

10 Defendant came under the radar of the Department of Homeland Security after he distributed  
 11 child pornography to under cover law enforcement officers acting independent of one another in Florida  
 12 and New Zealand. Using variations of his on-line moniker "fingertips," defendant engaged in one-to-  
 13 one chats with the under-cover officers about their experiences with younger girls. Among other things,  
 14 defendant bragged that he chats with "moms and daughters who do each other." More importantly, he  
 15 described his own experience as an adult with a young girl in a chat he had with the under-cover law  
 16 enforcement officer in New Zealand ("CII"):

17 CII: have u ever been with ynger??

18 fingertips2u: youngest 14

19 CII: kk

20 fingertips2u: a 3 som with my gf

21 CII: wow

22 were u both 14 too

23 fingertips2u: best ever

24 oh no

25 i was about 40 gf 30

26 CII: OMG for real??

27 how did u manage that??

28 fingertips2u: for real

1 See PSR ¶ 8. Defendant also sent the New Zealand law enforcement officer child pornography,  
2 including an image depicting the anal penetration of a young girl by an adult male. See PSR ¶ 18.

3 Defendant's on line correspondence with an HSI agent from Florida was less revealing, but  
4 significant in that the defendant maintained the chat with the under-cover agent even after the agent  
5 informed defendant she was only 14 years old during their chat. See PSR ¶ 13. After being informed he  
6 was communicating with a 14-year old girl, defendant advised the agent playing the 14-year old how to  
7 download Yahoo Messenger so they could continue their chat, and then proceeded to send child  
8 pornographic images to the agent posing as a minor. See PSR ¶¶ 13-14.

9 The investigation also uncovered chat conversations defendant had which demonstrated that his  
10 behavior with the under-cover agents was not isolated. Defendant chatted about watching his girlfriend  
11 and a 14-year old's sexual encounter in multiple chats. See PSR ¶ 22. He also carried on an extended  
12 chat with a self-described 14-year old girl. The content of the chat reflects that they exchanged  
13 pornographic images, and discussed defendant engaging in anal intercourse with the girl:

14 Finger Tips: i'd rather fuck your tight little asshole if you don't mind

15 Girl: so you liked lookin at my butt?

16 Girl: gawd yes shove your cock in my asshole and just pound me

17 Finger Tips: senseless

18 See PSR ¶¶ 24-25.

19 Defendant had a massive collection of child pornography. A search of defendant's home  
20 resulted in the seizure of eight different computers or hard drives containing child pornography, and  
21 more than 10,000 images and 150 videos of child pornography were recovered from defendant's  
22 devices. See PSR ¶ 27. Defendant's collection included extended videos in which three to five-year old  
23 girls were raped or otherwise forced to participate in sexual encounters with adults. See PSR ¶ 28. His  
24 collection included sadistic images involving various sexual activities with toddlers. See PSR ¶ 29.

## 25 **B. Victim Impact**

26 The National Center for Mission and Exploited Children ("NCMEC") was able to identify the  
27 child victims depicted in approximately 51 videos and 2,337 images defendant possessed, reflecting that  
28 the majority of the images and videos possessed by defendant involved images of victims who are

1 unknown, or have not been identified by law enforcement. *See* PSR ¶ 27. Defendant's collection  
 2 included at least one image or video from at least 138 different known series of child pornography. *See*  
 3 PSR ¶ 31. Of the known identified series of child pornography in defendant's collection, who were  
 4 notified or not notified as requested by the victims through the victim notification process, only one  
 5 victim from one series, "Casseaopeia" from the Lighthouse Series, has submitted a request for  
 6 restitution.

7 The victim impact statement from the victim "Casseaopeia" expresses the ongoing grief,  
 8 humiliation and fear she continues to suffer from today, and reflects the nature of ongoing harm suffered  
 9 by the other hundreds and perhaps thousands of victims in defendant's collection:

10 Between the ages of 3 – 11 years old, I was raped, molested, beaten and  
 11 humiliated. My abuse was photographed, videotaped and sent all over the  
 12 Internet for men/women to see and get off on. If I didn't perform for the  
 13 camera or didn't perform right for the camera, I was hit and punished. I  
 will never have back that part of my life. I will never have back my  
 innocent years.

14 Yes, the rape and molestation stopped, but I continue to be victimized by  
 15 these perverted rapists and kiddy porn people passing around the  
 16 distributing pornographic videos and images of me. No child should be  
 17 put through all that I went through let alone have to live with the  
 knowledge that people continue to watch and take pleasure in my abuse  
 and not be able to do anything to stop it.

18 In know that my image is being downloaded and watched by these kiddy  
 19 porn perverts all across the country. I worry that they know who I am. I  
 20 worry that they will come and look for me. I have worry that they will  
 21 come and hurt my family. I'm terrified that someone is stalking me. I have  
 22 changes my appearance so they can't find me, but I still have panic attacks  
 when I think some is looking at me because they recognize me from the  
 Internet. I have difficulty working and being in public because of  
 anxiety and want to hide somewhere safe.

23 I am ashamed and angry that I didn't speak up and stop the abuse and now  
 24 images of my younger sisters are also on the Internet. I am embarrassed that  
 25 the tapes and pictures are out there for some kiddy porn pervert to take  
 26 pleasure in. My abused showed me photographs and videos of other  
 27 children to convince me that what we were doing was normal so I worry  
 that these kiddy porn perverts are using my images as a tool to persuade  
 other children to do the type of sexual thinks I had to do.

28 I suffer from PTSD and chronic depression. I am working on getting better,  
 but knowing that these kiddy porn perverts are still downloading and  
 distributing my images makes recovery more difficult. It prevents the

wound from healing.

What I have lost is irreplaceable, but I want some form of justice to help me become a survivor and not just a victim of this continuing abuse. In my opinion there is no fixing them. They are truly a whole different form of monster. I believe these perpetrators deserve to be locked away and the key thrown away.

The victim requests a minimum of \$12,000 in restitution, as well as \$1,500 in attorneys' fees. *See* PSR ¶ 32. Her request is supported by an economic analysis of the damages she has suffered, including the cost of therapy to address the trauma she continues to suffer today.

### C. Sentencing Guideline Range and Plea Agreement

The defendant pled guilty pursuant to a Rule 11(c)(1)(B) plea agreement, and the parties agreed to the following Guidelines calculation:

a.	<u>Base Offense Level:</u> (U.S.S.G. §2G2.2(a)(1)):	18
b.	<u>Specific Offense Characteristics:</u> Material involved prepubescent minor (U.S.S.G. §2G2.2(b)(2)):	+2
	Offense involved distribution (U.S.S.G. §2G2.2(b)(3)(F)):	+2
	Offense involved sadistic or masochistic conduct or other depictions of violence (U.S.S.G. §2G2.2(b)(4)):	+4
	Offense involved use of computer (U.S.S.G. §2G2.2(b)(6)):	+2
	Offense involved more than 600 images (U.S.S.G. §2G2.2(b)(7)(D)):	+5
c.	<u>Acceptance of Responsibility:</u> If defendant meet the requirements of U.S.S.G. §3E1.1, he may be entitled to a three-level reduction.	<u>-3</u>
d.	<u>Adjusted Offense Level:</u>	30

A total offense level of 30 and Criminal History Category I results in a sentencing range of 97 to 121 months. As discussed later in this Memorandum, the government believes a sentence of 78 months, to be followed by nine years of supervised release, is an appropriate sentence taking into account the factors set forth in 18 U.S.C. § 3553(a), provided defendant accepts full responsibility for his conduct.

## III. GOVERNMENT'S SENTENCING RECOMMENDATION

### A. Section 3553(a) Factors

#### 1. Nature and Circumstances of the Offense

The nature and circumstance of defendant's offense are well described in the PSR and in the

1 recommendation of the probation officer. Defendant was caught trading child pornography on line,  
 2 including child pornography depicting the penetration of young girls estimated to be between the ages of  
 3 three and five. In total, defendant had more than ten thousand images and 150 videos in his possession,  
 4 a very large collection spread across eight devices found in his possession. Disturbing chat  
 5 conversations were recovered from the defendant's devices, including a chat demonstrating defendant's  
 6 interest in a sexual encounter with a 14-year old. Multiple chats were recovered in which defendant  
 7 made reference to a sexual encounter he shared with his girlfriend and a different 14-year old, described  
 8 in one chat as a girl from the neighborhood. The chats recovered indicate defendant sent child  
 9 pornography to the persons he chatted with, including children, and an agent posing as a 14-year old.

## 10 **2. The Seriousness of the Offense**

11 The Supreme Court recently opined on the seriousness of child pornography possession,  
 12 specifically the harm the crime causes to victims. *See Paroline v. United States*, 134 S.Ct 1710 (2014).  
 13 In *Paroline* the issue before the Court was what restitution a defendant owed to a victim when he  
 14 possessed images of her on his computer, and the Court's spoke powerfully of the type of harm  
 15 possession of child pornography creates for the victims: "The harms caused by child pornography,  
 16 however, are still more extensive because child pornography is 'a permanent record' of the depicted  
 17 child's abuse, and 'the harm to the child is exacerbated by [its] circulation.'" *Id.* at 1716-17, *quoting*,  
 18 *New York v. Ferber*, 458 U.S. 747, 759 (1982). "Because child pornography is now traded with ease on  
 19 the Internet, 'the number of still images and videos memorializing the sexual assault and other sexual  
 20 exploitation of children, many very young in age, has grown exponentially.'" *Id. quoting*, United States  
 21 Sentencing Comm'n, P. Saris et al., Federal Child Pornography Offenses 3 (2012).

22 The Court recognized that possession of child pornography is not a passive crime: "[t]hese  
 23 crimes were compounded by the distribution of the images of her abuser's horrific acts, which meant the  
 24 wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would  
 25 be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed  
 26 against her." *Id.* The government emphasizes the Supreme Court's analysis here not to make a case for  
 27 restitution (which is discussed below), but because the Court unequivocally recognized the real harm to  
 28 real human beings that results from the conduct in which the defendant engaged.

1 The impact statement detailed above demonstrates that the possession and distribution of child  
 2 pornography creates ongoing harm to the child-victims. As many of the children write, the enduring and  
 3 harmful ramifications of the original sexual abuse are compounded by the seemingly-endless  
 4 dissemination and viewing of it by others, like the defendant.

### 5 **3. The Need to Deter Criminal Conduct and Protect the Public**

6 Defendant's possession of child pornography was extensive, and represents the depth of his  
 7 criminal conduct vis-à-vis the hundreds or thousands of victims depicted in the images and videos he  
 8 possessed. More importantly, in terms of protecting the public, defendant's chats reflect his interest in  
 9 engaging in sexual conduct with minors, and reflect that he had at least one such prior encounter with a  
 10 girl from the neighborhood. This exchange reflects a direct threat to the community at large, and the  
 11 community in which he lives. The defendant will likely characterize statements reflecting his  
 12 experiences and discussions of possible encounters as mere fantasy. But his own words speak for  
 13 themselves, and at a minimum reflect both an interest in sex with minors and a comfort level in chatting  
 14 with minors about live encounters. The fact that he sends child pornography to minors and seems to  
 15 have received the same in return from them, reflects a degree of association with minors that goes well  
 16 beyond an individual whose behavior ends at the mere possession of illicit images. A substantial  
 17 sentence should be imposed to deter criminal conduct and protect the public.

### 18 **B. The Government Recommends a 78 Month Prison Sentence to Be Followed by Nine** 19 **Years of Supervised Release.**

20 After substantial consideration of the facts of this case, and the arguments presented by  
 21 defendant regarding bases for mitigation, the government recommends a sentence of 78 months, to be  
 22 followed by nine years of supervised release. A 78-month sentence represents a downward variance that  
 23 takes into account defendant's upbringing and the life he has lived, while not minimizing the very real  
 24 damage his crimes have caused, and the risk his crimes represent. It represents the mid-point between  
 25 the United States Probation Office's recommendation and the low end of the guideline sentence he  
 26 faces. Had the government charged defendant with distribution, defendant would be facing a five-year  
 27 mandatory minimum sentence. Here, defendant not only engaged in distribution, but he distributed  
 28 child pornography to children. Moreover, he did so in the context of conversations in which he and the



1 children discussed engaging in sexual activities together. Though the government is not aware of  
 2 communications which went the next step towards arranging meetings or meeting with minors,  
 3 defendant's known conduct took his interactions with minors to the precipice of such a possibility. If  
 4 not for the charitable works of defendant, his lack of a criminal record, and possible abuse he may have  
 5 suffered as a youth, the government would not recommend a variance down to a 78-month sentence.  
 6 The defendant faces a mandatory minimum of five years of supervised release for his crime, and a  
 7 maximum term of life. The government recommends nine years of supervised release to follow his  
 8 prison term, which would bring his total federal supervision, including time of incarceration, to 15 years  
 9 and six months.

#### 10 **IV. RESTITUTION**

11 One victim, "Casseaopeia," from the *Lighthouse* Series, seeks restitution pursuant to 18 U.S.C. §  
 12 2259(a). The materials submitted by counsel representing the victim is being filed separately under seal,  
 13 as Exhibit 1 to this memorandum. Based on these submissions, and as discussed below, the government  
 14 asks that the Court order the defendant to pay \$5,000 in restitution to the victim. The government  
 15 understands that defendant does not oppose the restitution requested by the government, an amount  
 16 supported by both statute and case law.

17 Restitution in this case is mandatory. Title 18, United States Code, Section 2259(a) provides that  
 18 "the court shall order restitution for any offense under this chapter." Section 2259(b)(4)(A) states that  
 19 [t]he issuance of a restitution order under this title is mandatory." Like possession of child pornography,  
 20 Section 2259 falls within Chapter 110. Once the statute is satisfied, "[t]he court may not decline to issue  
 21 an order under this section because of: (i) the economic circumstances of the defendant; or (ii) the fact  
 22 that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of  
 23 insurance or some other source

24 In *Paroline*, the issue before the Court was whether a defendant who possessed images of a  
 25 child-victim is liable for restitution to that victim years later for all or part of the financial losses the  
 26 victim incurred for expenses such as counseling and lost income as a result of the trauma experienced  
 27 dissemination of her images to thousands of individuals such as the defendant. *Paroline, supra*, 134  
 28 S.Ct. at 1716-18. The Court found that liability for restitution was appropriate under these



1 circumstances, holding that “[t]he cause of the victim’s general losses is the trade of her images. And  
 2 Paroline is part of that cause, for he is one of those who viewed her images.” The Court stated:

3 “Denying restitution in cases like this would also be at odds with the  
 4 penological purposes of § 2259’s mandatory restitution scheme. In a  
 5 sense, every viewing of child pornography is a repetition of the victim’s  
 6 abuse. One reason to make restitution mandatory for crimes like this is to  
 7 impress upon offenders that their conduct produces concrete and  
 devastating harms for real, identifiable victims...It would be inconsistent  
 with this purpose to apply the statute in a way that leaves offenders with  
 the mistaken impression that child-pornography possession (at least where  
 the images are in wide circulation) is a victimless crime.”

8 *Id.* at 1727.

9 There is no requirement to prove particularized conduct leading to particularized harm. *See id.*  
 10 All that matters is that a victim’s loss was generally attributed to the trafficking and viewing of the  
 11 victim’s images. The materials submitted by the victim easily exceed that burden of proof. Counsel for  
 12 the victim known as “Casseaopeia” has submitted a request asking that the Court order the defendant to  
 13 pay no less than \$12,000 for one image of Casseaopeia (out of a total estimated economic loss of  
 14 approximately \$1,078,159). *See*, Exhibit 1, Letter from Sara J. Powell. Counsel for “Casseaopeia”  
 15 reports that a total of \$229,250 in restitution to “Casseaopeia” had been ordered, and that of that total,  
 16 \$63,300.00 has been paid. The Child Exploitation and Obscenity Section (“CEOS”) of the U.S.  
 17 Department of Justice has started to compile information provided by federal prosecutors pertaining to  
 18 restitution ordered by sentencing courts for specific victims. The CEOS data reflects that for *reported*  
 19 *Federal cases*, sentencing courts have ordered restitution paid to the victims of the Lighthouse series in  
 20 56 federal cases, with an average amount in excess of \$4,000, and amounts ranging from \$500 to  
 21 \$50,000 for persons convicted of possession of child pornography. In light of all the available  
 22 information, a restitution award of \$5,000 is appropriate, and is neither “nominal” nor “token.”

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1 **V. CONCLUSION**

2 For the reasons discussed above, the government respectfully requests that the Court sentence  
3 defendant to 78 months in prison, to be followed by nine years of supervised release, \$5,000 in  
4 restitution to the victim “Casseaopeia,” a \$15,000 fine, forfeiture, and a \$100 special assessment.  
5

6 Dated: February 7, 2017

BRIAN J. STRETCH  
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7  
8 /s/  
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# EXHIBIT 1

Regarding: EXHIBIT 1 UNDER SEAL

This filing is in paper or physical form only, and is being maintained in the case file in the Clerk's office. If you are a participant on this case, this filing will be served in hard-copy shortly. For information on retrieving this filing directly from the court, please see the court's main web site at <http://www.cand.uscourts.gov> under Frequently Asked Questions (FAQ).

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